



e2r Alert

Equity Awards and the Obligation to Notify

A recent Ontario Superior Court case has held that a stock award agreement's termination provisions were unenforceable because the provisions were not sufficiently brought to the employee's attention.

In *Battiston v. Microsoft Canada Inc.*, an employee with 23 years of service was terminated without cause. As part of his compensation, he received stock awards pursuant to the employer's annual Stock Award Agreements. The Agreements clearly provided that all unvested awards were forfeited upon termination for any reason. Yearly stock awards were communicated to employees by email, which included a link for employees to complete the online acceptance process. The online acceptance process required employees to confirm they had read and accepted the terms of the Agreement.

Despite the language in the Agreement, the employee, as part of his claim for reasonable notice, claimed an entitlement to any unvested awards that would have vested during his reasonable notice period. The employee testified that while he did click the 'read and understood' acknowledgement, he hadn't actually read the Agreements because of their length. He further testified that no particular language related to forfeiture upon termination was brought to his attention. The employer, on the other hand, argued that the employee was not entitled to unvested awards based upon the clear and unambiguous language in the Agreements.

Despite determining that the Agreements' termination provisions were unambiguous and clearly displaced an employee's right to unvested stock awards during the common law notice period, the provisions were unenforceable because they were 'harsh and oppressive' and not brought to the employee's attention. In its reasoning, the court noted that reasonable measures must be taken to draw harsh and oppressive terms to the attention of the other party, failing which the terms will be unenforceable. Moreover, the court concluded that the email notification and click through acknowledgement did not constitute 'reasonable measures' to bring the oppressive terms to the employee's attention. Accordingly, the court awarded the employee the value of the awards that were scheduled to vest during his common law notice period.

While there have been cases addressing the obligation to draw to an employee's attention language restricting rights to bonuses upon termination, this is the first case to make this finding related to stock/equity awards. Accordingly, we recommend that all employers who issue similar type awards review their processes to ensure that there is no dispute over whether those key terms

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have been communicated to the 'reasonable measures' standard. In essence, simply providing the plan documents and requesting a 'read, understood and agreed' acknowledgement will no longer suffice.

If you have any questions about this, please do not hesitate to reach out to speak with an e2r® Advisor.